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Citation for published version:

Cowan, S 2010, The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic 'Assaults'. in J Chalmers, F Leverik & L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon*. Edinburgh Studies in Law, Edinburgh University Press, Edinburgh, pp. 126-40.
<https://doi.org/10.3366/edinburgh/9780748640706.003.0019>

Digital Object Identifier (DOI):

[10.3366/edinburgh/9780748640706.003.0019](https://doi.org/10.3366/edinburgh/9780748640706.003.0019)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Essays in Criminal Law in Honour of Sir Gerald Gordon

Publisher Rights Statement:

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The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic “Assaults”

Sharon Cowan^{*}

“A bibliography of decriminalisation would give the impression that our civilisation was preoccupied by sex and death.” (Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (1980) 2)

This essay offers an analysis of the criminalisation of certain sexual practices that have been (wrongly) labelled as assaults. It discusses the criminal cases both in Scotland and in England and Wales that address the question of whether sado-masochism (SM) counts as sex or violence, and thus whether consent can work its “moral magic” to render SM lawful.¹ The essay examines the legal approach to SM in both jurisdictions, and the (hetero)normative construction of certain kinds of sexual subjects as perverted and “risky”, before moving to enquire as to the possibility of Scots law offering a discursive and legal space for SM sex. In doing so, it will be argued that while both jurisdictions have criminalised consensual assaults, thus marking out pleasurable pain as both wrong and harmful, there may ultimately be room for the Scottish courts to interpret the existing law in a way that is more open to allowing consensual SM sexual interactions. It is possible, therefore, that those practising SM sex have cause to be optimistic about the role of the Scottish courts in rendering their sexual choices legitimate.

A. THE LAW ON SADO-MASOCHISTIC “ASSAULT”

There seems to be some divergence in approach between the English and Scottish courts on criminalising assaults. In *R v Brown*,² the House of Lords held by a majority of 3:2 that, established exceptions aside (such as tattooing, sport, medical treatment

^{*} The author is grateful to Findlay Stark for editorial assistance.

¹ H Hurd, “The moral magic of consent” (1996) 2 Legal Theory 121.

² [1994] 1 AC 212, following *Attorney-General’s Reference (No 6 of 1980)* [1981] QB 715.

and “horseplay”),³ assaults amounting to less than actual bodily harm could be lawful if valid consent was given, but that any injury amounting to actual bodily harm or worse could not be justified by consent.⁴ Bodily harm inflicted for the purposes of sexual pleasure does not properly constitute an exception to this rule.⁵ The decision in *Brown* has been roundly criticised by academic commentators, particularly on the grounds that the majority judges demonstrated a moralistic distaste for homosexuality.⁶ Nevertheless, in the explanatory notes to the Criminal Justice and Immigration Bill, as introduced, the government referred to *Brown* as a case of “consensual torture”, and stated that the offence of possession of extreme pornography contained in the Bill was in part justified by the offences committed in *Brown*.⁷

The Scottish courts, however, have never directly addressed the legality of SM *per se*. A case similar in its facts to *Brown* – where consenting parties are convicted of assaulting each other through SM practices – has not arisen here, but there is authority for the notion that one cannot avoid a conviction of assault merely on the basis that a fight (or “square go”) has been consented to by both parties.

³ In *R v Jones* (1986) 83 Cr App R 375, rough horseplay – where injury might really be said to have been inflicted for sadistic reasons – was said to be lawful because the defendants believed there to have been consent.

⁴ The law in England and Wales on assaults is contained in the Offences Against the Person Act 1861. Section 47 deals with assault occasioning actual bodily harm, and sections 20 and 18 govern grievous bodily harm and grievous bodily harm inflicted with intent, respectively. Common assault and battery are common law offences – see *R v Venna* [1976] QB 421.

⁵ This view has been confirmed by the subsequent SM case of *R v Emmett*, *The Times* 15 Oct 1999.

⁶ See L Bibbings and P Alldridge, “Sexual expression, body alteration and the defence of consent” (1993) 20 *Journal of Law and Society* 356; N Bamforth, “Sado-masochism and consent” [1994] *Crim LR* 661; S Nash, “Consent: public policy or legal moralism?” (1996) *NLJ* 382; D Archard, *Sexual Consent* (1998); K Egan, “Morality based legislation is alive and well: why the law permits consent to body modification but not sadomasochistic sex” (2006-2007) 70 *Albany Law Review* 1615.

⁷ See paragraph 803 of the explanatory notes to the Bill at <http://www.publications.parliament.uk/pa/cm200607/cmbills/130/en/2007130en.pdf>. The 2005 government consultation on the proposed Bill can be found at <http://www.homeoffice.gov.uk/documents/cons-extreme-porn-3008051/>, and a complete set of responses to the consultation can be found at <http://www.dur.ac.uk/law/research/politicsofporn/responses/>.

The distinction made by the court in that case – *Smart v HM Advocate*⁸ – was not between sex and violence, but between (regulated) sports and the (unregulated) physical fight, the whole purpose of the latter being “to inflict physical damage on the opponent in pursuance of a quarrel”.⁹ The only Scottish decision that is sometimes thought to deal with questions of consent to SM sex is the gruesome *McDonald v HM Advocate*,¹⁰ which is certainly at one end of the spectrum of injurious behaviour. McDonald killed his wife during sexual intercourse. He claimed that the death was accidental and the sex consensual, but was convicted of culpable homicide. However the case cannot be a final authority for the question of the legality of consensual SM, since one of the parties to the encounter died in the process, therefore precluding a rigorous assessment of whether consent truly existed. Indeed there was some ambiguity as whether the accused’s wife was trying to communicate that she was suffering pain and distress rather than experiencing pain and pleasure.¹¹

What is more, the case can be read as not one of SM at all: the sex which caused the injury leading to death involved anal penetration with an object (a whip), but this act does not in itself mark the encounter as one of SM. Support for this assertion can be gained from the somewhat analogous English case of *R v Slingsby*,¹² in which a man anally and vaginally penetrated a woman with his fist whilst wearing a signet ring. The woman died of septicaemia after her injuries became infected, and it was held that the accused was not guilty of manslaughter since this was merely vigorous sexual activity to which his partner had consented. Similarly, the Crown in *McDonald* conceded that if the appellant had intended only to cause pain, as opposed to actual injury, this in itself would not constitute evil intent and the conviction could not be maintained.¹³ In any case, even if *McDonald* were held to be relevant to SM, the degree of violence inflicted in the case is not representative of the range of sado-

⁸ 1975 JC 30.

⁹ At 33.

¹⁰ 2004 SCCR 161.

¹¹ Arguably, even if the rule on consent established in *Smart* were not followed, and SM sex was something that could be consented to, the jury might still have convicted *McDonald* of culpable homicide (i.e. finding that the encounter was non-consensual).

¹² [1995] Crim LR 570.

¹³ In my view there is an unexplored relationship here between pain and harm, and one can question whether all pain is necessarily harmful.

masochistic encounters that take place across the country on a daily basis,¹⁴ and we could still look to law to protect those who do not in fact consent to SM sexual behaviour (in the same way that we rely on the law to protect us from non-consensual non-SM sexual acts). Arguably then, since the facts of a case like *Brown* have not been considered in Scotland, if a case about SM arose here there might still be room for Scottish courts to find in the future that SM is a valid form of sexual expression and more akin to touching rather to fighting. Can Scotland for once step into the breach and boldly go beyond the morality driven conservatism of the court in *Brown*? In short, are the Scottish courts likely to find that consensual SM contact is sexual activity rather than violence?

B. SEXUAL NORM(ATIVE)S

A close reading of Sir Gerald Gordon's authoritative commentary on Scots criminal law yields little on the subject of sadomasochism (though Gordon does comment on consent in assaults elsewhere).¹⁵ However, as Gordon notes in the second edition in 1978, the court in *Smart* rejected the distinction that he himself made in the first edition in 1967 between minor and major injuries. In the first edition, Gordon stated that "[w]here the assault does not involve another crime, the position appears to be that consent is a good defence provided that not more than a certain degree of injury is caused".¹⁶ The court in *Smart* however said that leaving aside the difficulty of distinguishing between minor and major injury, that what was relevant was not the level of injury but whether or not the accused displayed "evil intent".¹⁷ It appears, then, that were *Brown*-like circumstances to come before them, the Scottish criminal courts would reach a similar conclusion to that reached in *Brown* and convict participants in such acts; indeed, one might speculate that the Scottish courts would be even more conservative in SM cases than their English counterparts, given that unlike *Brown*, the court in *Smart* refused to recognise a distinction between minor and major

¹⁴ A Beckmann, "Deconstructing myths: the social construction of 'sadomasochism' versus 'subjugated knowledges' of practitioners of consensual SM" (2001) 8 *Journal of Criminal Justice and Popular Culture* 66.

¹⁵ G H Gordon, "Consent in assault: further thoughts" (1976) 21 *JLSS* 168.

¹⁶ G H Gordon, *The Criminal Law of Scotland* (1967) 744.

¹⁷ At 33.

injuries. Nonetheless, as Gordon also notes in the second edition, the court in *Smart* suggested that some forms of contact – that is, “touching” – in a sexual context could be consented to, since the necessary “evil intent” to attack the person would not be present in such a case. Gordon goes on to state that “[i]t seems, therefore, that *where there is no intention to do bodily harm, consent may still be a defence to assault*”.¹⁸

Gordon’s analysis of the court’s statement prompts the following question: does SM not fall into this category of touching where there is no evil intention, because the primary intention is to bring pleasure and not to do bodily harm or injury? And therefore, why not say that SM can be consented to? The answer might be that there are different degrees of sexual touching, so that *mere* touching in the course of sexual interaction by itself is fine and can be consented to, but *more than* touching is not and cannot. But what is *more than touching*? Answering this question involves two separate inquiries. Firstly, what does *touching* mean in this context – is it a non-descriptive or thin concept such as physical contact, or is there a more descriptive, thicker notion at play here, implying that the contact is, say: minimal; gentle; caressing; loving; non-penetrative; or some other adjective(s)? And secondly, what does *more* mean in this context – more what precisely? More vigorous? More extensive? More injurious? We can see then that to claim that mere touching is lawful, and can be consented to but more than touching is not, does not much help us to understand the proper boundaries of lawful behaviour.

Assuming that the law cannot stipulate that only loving, non-penetrative and gentle touching is lawful, since to do so would mean that (heterosexual) consensual acts such as those in *Slingsby* would be criminal, and the law does not seem to want to define these acts as criminal, we might suppose that the distinction between mere touching and more (that is, bodily harm) rests upon the degree of injury caused. But *Slingsby*’s actions resulted in death and the question of consent as it relates to injury was said not to be relevant (on the basis that this was primarily sex and not primarily violence, the converse of the position taken in *Brown*). Obviously then some of what is seen as “normal” sexual contact involves fairly rigorous activity and can therefore involve bruising, scratching, biting and sometimes bleeding (internal or external). Is this mere touching, or is it bodily harm? In 1953 Kinsey et al found that over 50% of

¹⁸ GH Gordon, *The Criminal Law of Scotland*, 2nd edn (1978) para 29-39 (emphasis added). This sentence remains unchanged in the 3rd edn (2001, by M G A Christie) para 29-39.

men and women have an erotic response to being bitten.¹⁹ Kinsey also noted that scratching and biting frequently play a part in conventional sex, and that physiologically the response to pain is similar to orgasm.²⁰ Even the most traditional form of “vanilla” sexual intercourse can often cause pain (for various physiological reasons). Does this pain in itself count as harm for the purposes of the criminal law?

It seems from the court’s statement in *Smart* that Scots law acknowledges that “normal” sexual encounters can involve some level of what could be described as bodily harm or injury, but that these are not assaults. That is to say, there seems to be a distinction between injury and assault. What precisely is the basis for this distinction? Gordon does not define injury, and neither does the court in *Smart*. Under English law injuries that might be inflicted through “normal” sexual interaction, that cause manifest damage to skin – bruises, bites, etc – would be seen as a common assault, and criminalised (unless consented to). These are, in essence, injuries, but not assaults. As in the Scottish context, given the position taken in *Smart*, it seems that the primary concern regarding assault in both jurisdictions, then, is the question of the motivation or intention underlying the contact. Thus, if the primary intention of the touching is to hurt or harm the touchee, then it is an injury, an assault that cannot be consented to; however, if this touching takes place in the course of a “normal” sexual encounter where the primary intention is pleasure (whether mutual or not) then it does not amount to injury but to normal sexual touching. In other words it is still the intention, the *mens rea* of the person doing the touching that is the lynchpin of the offence of assault, rather than the consent itself.

Thus we can say that consent does no work in delineating lawful from unlawful contact in these kinds of cases. Rather, it is the “good” (rather than “evil”) intention of the person doing the touching that is necessary (and also sufficient)²¹ to

¹⁹ Egan (n 6).

²⁰ M S Weinberg, C J Williams and C Moser, “The social constituents of sadomasochism” (1983) 31 Social Problems 379.

²¹ Sufficient in the sense that currently, under Scots criminal law, any man who touches a woman in a sexual context can expect the law to affirm the legality of that contact, regardless of a lack of consent on her part, if he genuinely believed her to be consenting. The Sexual Offences (Scotland) Act 2009, not yet in force, does not replace this subjective test with a fully objective one, but requires that a man has reasonable belief in consent, based on some (unspecified) steps he took to confirm his belief (section 1(2)). Feminists and other critical scholars have been very sceptical of the practical value of a similar reform introduced in England and Wales, particularly when the accused is not compelled to testify and there can be no negative inference

render the touching lawful. But the question remains as to what counts as “good” intentions. In practice, assessing good intentions involves a normative assessment of the kind of sexual contact that has taken place. In a “normal” sexual interaction, while there may well be some low-level bodily harm, it is the nature of the sexual interaction, rather than the consent of the touchee, that makes the contact lawful. The presumption that those relationships perceived as normal are (usually) less likely to cause anything other than low level damage (if any at all), and that those interactions which cause high levels of injury are perceived to be abnormal and perverted, relies upon a rather narrow view (based on consensual heterosexual, vaginally-penetrative sex in the missionary position) of what constitutes a normal sexual encounter. Certainly it is true to say that the more one strays from this narrow (“vanilla”) form of sexual interaction, and travels along the spectrum of human sexual behaviour, the more likely we are to leave our mark on the bodies of the people we interact with sexually.

Also relevant here is the question of what has been used to bring the “injurious” pleasure – if the instruments of pleasure are the hands, the fingers and the penis, then again the risk of “injury” or damage inflicted is both normalised, and minimised – a nipple that is grazed from being pinched or bitten may well be seen as unproblematic as compared with a nipple that is bruised or bleeding from having been compressed in a nipple clamp. Likewise, it seems that internal vaginal bleeding after vigorous and prolonged penile penetrative intercourse (or even, as in *Slingsby*, fisting) may well be seen as more normal than lesser injuries inflicted with needles, hot wax, hot irons or nails. Therefore there appears to be some underlying and unstated normative principle driving the differentiation of normal (permissible) from abnormal (impermissible) sexual behaviours; *some* consensual encounters where activities result in injury (and in some cases even death) are permissible, *others* are not.

drawn from his lack of testimony. For critical comment on both the Scots and the English approaches see S Cowan, “All change or business as usual? Reforming the law of rape in Scotland” in C McGlynn and V Munro (eds), *Rethinking Rape Law* (forthcoming, 2010); C McGlynn, “Feminist activism and rape law reform in England And Wales: a Sisyphean struggle?”, *ibid*; S Cowan, “Freedom and capacity to make a choice: a feminist analysis of consent in the criminal law” in V Munro and C Stychin (eds), *Sexuality and the Law: Feminist Engagements* (2007); P R Ferguson and F Raitt, “Reforming the Scots law of rape: redefining the offence” (2006) 10 *EdinLR* 185.

C. SEX OR VIOLENCE? DRAWING LINES

Clearly there are a number of places between the rule in *Smart* (it is not permissible to consent to any injury) and the facts of *McDonald* (causing death) where one could draw the line which would allow for consent to validate SM sexual activities. One could certainly argue for the decriminalisation of SM activities that amount to less than actual bodily harm as the English courts have done in *Brown*, or for decriminalisation of injury less than serious bodily harm (as some commentators such as Kelly Egan²² have done), or perhaps even to serious harm that does not cause death or endanger life.

The majority decision in *Brown* criminalised consensual assault amounting to actual bodily harm (or above), even where the assault is sexual in nature. This is predicated on the following assumptions: that sex and violence are distinct and easily separable (which is not obvious); that the court is in the best position to tell the difference (which is certainly not obvious); and that consent to one is not necessarily consent to the other (which, insofar as they can be separated, is arguably true). The court does not deny the “enthusiasm” of the defendants in choosing to participate in certain sexual behaviours, but instead reads the acts as seriously violent, and thereby incapable of being “ratified” by the concept of consent.²³ In *Brown*, some judges were prepared to go further than just ignore consent as the relevant factor – the consent of such persons was perceived by Lord Templeman to be “dubious and worthless”.²⁴ Here, the court’s view of sex is obscured by a focus on violence, in the sense that the supposedly perverted and deviant form of sex engaged in here takes the behaviour out of the normal category of touching and into the abnormal category of injury and violence.

Further, the rule in *Brown* that one cannot consent to assaults that cause actual bodily harm (other than in well established exceptional situations) has now been

²² Egan (n 6).

²³ N Athanassoulis also suggests that the offences have been misclassified as violence, but she tries to demonstrate this through comparing SM (which she says is sex expressed through violence) with rape (which she claims is violence expressed through sex). See N Athanassoulis, “The role of consent in sado-masochistic practices” (2002) 8 Res Publica 141.

²⁴ At 235.

qualified – clearly after *Dica*²⁵ (the HIV transmission case) one can consent to the risk of bodily harm through transmission, as well as the harm of actual transmission itself, if it is within a sexual context, and it is a disease related harm that one has specific knowledge of.²⁶ There is an apparent contradiction between *Brown* and *Dica*.²⁷ Both *Dica* and *Brown* are cases of consensual sexual activity. The former states that parties *can* consent to the risk of transmission - that is, the exposure to the risk of serious harm, for the sake of sexual gratification. The actual harm of any resulting infection can itself also be consented to. The latter states that parties *cannot* consent to the risk of serious harm, for the sake of sexual gratification (anyone who risked such harm would be guilty of an attempted assault). Clearly any actual resulting harm is then also criminal. Should the criminal law distinguish between these two sorts of cases in this way? Those who risk harm without consent, such as *Dica*, are of course criminalised, but if he gained consent he would not have been criminally liable, whereas those who consensually risk harm, such as *Brown*, are criminalised. But the reckless non-consensual transmission of disease cases provide us with a clearer and stronger reason for criminalisation than a case such as *Brown*.²⁸ Actions such as those performed by the defendant in *Dica* are by any measurement morally and ethically wrong, as they are not founded on concepts such as mutuality of sexual expression, communication and sexual autonomy. The actions of those in *Brown* on the other hand are explicitly communicative, expressive, mutually agreed and enhancing of sexual autonomy. Of course the Court of Appeal in *Dica* distinguishes *Brown*. This must be correct; to treat the two cases as if they both relate to the same wrong – merely because they are both dealing with sex, consent and bodily harm – is mistaken. In this respect the Court of Appeal in *Dica* is right not to apply *Brown*.

²⁵ [2004] EWCA Crim 1103, [2004] QB 1257.

²⁶ The question of HIV transmission as assault in Scotland was addressed in *HM Advocate v Kelly*, High Court at Glasgow, February 2001, unreported. For comment see V Tadros “Recklessness, consent and the transmission of HIV” (2001) Edin LR 371.

²⁷ S Leake and D Ormerod, “Case comment” [2004] Crim LR 944 at 948.

²⁸ For persuasive arguments against the criminalisation of HIV transmission see M Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (2007); M Weait, “Criminal law and the sexual transmission of HIV: *R v Dica*” (2005) 68 MLR 120; M Weait, “Taking the blame: criminal law, social responsibility and the sexual transmission of HIV” (2001) 23 Journal of Social Welfare and Family Law 441. Cf J Chalmers, *Legal Responses to HIV and AIDS* (2008) ch 6.

However, the court distinguishes *Brown* for entirely the wrong reasons, explicitly distancing itself from *Brown* in saying that SM cases are about serious violence, inflicted for sexual gratification, and the present case is not. However this supposed distinction is not properly justified. One cannot help but question whether the fact that *Dica* allows consent to the risk of grievous bodily harm whereas *Brown* does not is because of the court's explicit assumption that the risk of HIV is just one of those risks that (normal) sexual intercourse incurs.²⁹ Indeed one might be forgiven for suspecting that the justification for allowing for the possibility of consent in *Dica* and not in *Brown* rests on a very traditional, conservative and heteronormative view of what sex is really supposed to be about. Judge LJ in *Dica* also invokes the argument of a realm of private sexual relations with which the criminal law should not interfere – an argument that was explicitly rejected in *Brown*.³⁰

An alternative reading, that would make neither *Dica* nor *Brown* situations unlawful, is as follows. Injury through the transmission of HIV is a risk, like pregnancy, inherent within “normal” sexual intercourse. Disease and therefore GBH is not the intended result, only a secondary by-product of sexual pleasure. Two people can therefore explicitly (through sharing knowledge of disease status) consent to taking such a risk for the purposes of pleasure. Likewise, the risk of injury (GBH) itself is a risk inherent within SM sexual activity. GBH is not the intended result, only a secondary by-product of sexual pleasure. Parties involved can (and the point is, do) explicitly agree to the taking of such risks for the purposes of pleasure. Both take place “in private” and are arguably not the business of criminal law. However there may be policy reasons, for example public health, that mean we would wish to make reckless (non-consensual) HIV transmission unlawful.³¹ Combine with this, in the HIV cases, the abuse of trust and lack of respect for sexual autonomy and communication, and we may well have a stronger case for the criminalisation of *Dica* (non-consensual violence) than for *Brown* (consensual sex).

D. THE ROLE OF CONSENT, PRIVACY AND AUTONOMY

²⁹ At para 47.

³⁰ *R v Brown* [1994] A.C. 212: Lord Jauncey at 245-6; Lord Lowry at 256; for the dissent on this point see Lord Mustill at 272-5.

³¹ Matthew Weait (see n 28) argues that public health is in fact the reason that we should *not* criminalise HIV transmission.

Those who argue against the criminalisation of SM sex contend that consent should be allowed to do more of the work in drawing the line between lawful and unlawful behaviour. Here it is necessary to set aside the debate over the merits and demerits of allowing a person to consent to enslavement or to being killed. Most of those against the criminalisation of SM agree that the criminal law is warranted in setting some limits to the kinds of behaviour that we can consent to (say, the criminalisation of grievous bodily harm), and that consensual slavery, for example, is one area where the law can justifiably intervene paternalistically. One critique of *Brown* is that the criminal law prevents the participants from acting in their own best interests as it prohibits them from expressing their sexual autonomy,³² and it is much less clear (assisted suicide notwithstanding) that consenting to being killed or consenting to enslavement is in the same “best interests” ball-park. The argument remains then, that when pronouncing certain acts unlawful, the criminal law is making prejudicial normative assessments about the sexual behaviour engaged in, and that, instead, we ought to let consent underpin the legality of the sex we have.

This is not to say that consent is itself unproblematic (and indeed in the context of sexual offences, consent has been identified as particularly troubling)³³ but simply that a contextualised analysis of the opportunity that participants have to freely agree to sexual activity is a more morally sound basis for the criminalisation of (sexual) assaults than a (hetero)normative assessment of “normal” as opposed to “abnormal” (perverted) sexual behaviour or relationships, and “normal” as opposed to “abnormal” levels of injury (and these two levels of inquiry are of course intertwined).

Many of those who argue specifically against the criminalisation of SM activities do so from a liberal perspective – the protection of autonomy, self-determination, private sexual relations and consent.³⁴ This approach still allows for protection of those who are really harmed because consent must still be freely given,

³² See for example the arguments made by the appellants in their appeal to the European Court of Human Rights; *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39.

³³ For feminist critique of consent across a number of different legal spheres, including sexual offences see R Hunter and S Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (2007).

³⁴ See e.g. Athanassoulis (n 23); Bibbings and Alldridge (n 6).

and non-consensual sado-masochism could be prosecuted in the same way as non-consensual sexual intercourse (but presenting, of course, many of the same practical problems of reporting, proof and evidence). There remains a critical tension, however, around key liberal concepts such as autonomy and privacy. In particular, feminists and gay and lesbian scholars (amongst others) have criticised the application of both autonomy and the classic public/private divide to the area of sexual relationships.

Nicola Lacey, for example, prefers to talk about the protection of sexual integrity rather than autonomy. Sexual integrity, she argues, better demonstrates that part of the harm of sexual offences centres on the victim's inability to integrate psychic and bodily experiences.³⁵ Lacey understands autonomy as too closely related to its history of the abstract choosing subject and, referring to Cornell, argues that the project of personhood requires a more active, positive and embodied view of the sexual self than autonomy has traditionally allowed.³⁶

This kind of approach, applied to SM, would allow for consensual sado-masochistic practices, where participants can integrate psychic and bodily experiences, but without having to rely upon individualised, decontextualised, "private" readings of autonomy. Carl Stychin, a queer legal theorist, has argued that not only are homosexual subjects entitled to privacy protections, but that all sexual subjects have a right to claim a public sexual identity, and to take part in public life as sexual citizens,³⁷ as Beckmann (quoting Sarah Livitnoff) would put it, "we're not talking about what goes on in individual bedrooms, but about the acceptable public face of sex".³⁸ Perhaps ironically, the majority in the House of Lords in *Brown* refused to see the acts as purely private, on the (vague, if overtly homophobic) assumption that such activities produce public (social) harms: "[s]ado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society".³⁹

³⁵ N Lacey, "Unspeakable subjects, impossible rights: sexuality, integrity and criminal law" in N Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998) 118.

³⁶ Ibid 120. See also M Childs, "Sexual autonomy and law" (2001) 64 MLR 309 at 311.

³⁷ C Stychin, *Law's Desire: Sexuality and the Limits of Justice* (1995).

³⁸ Beckmann (n 14) at 71, quoting S Livitnoff, *What's Your Sexual Style? Solve The Mysteries of Attraction, Love and Sex* (1996), the quote itself coming via H Lacey, "Are you getting the sex you want?" *Independent* 18 May 1997.

³⁹ *R v Brown* [1994] 1 AC 212 at 255 per Lord Lowry.

There is also an associated problem with relying on a formalistic notion of consent without looking to the substance and context of the consent (e.g. knowledge of consequences as in HIV cases, or a coercive relationship as in some rape cases). Turning to consent as a justification for allowing certain behaviours surely has to be mediated by some consideration of the circumstances and social meanings of that consent. Interestingly, then, one of the advantages of consent in the SM context is that it usually takes place in conditions of explicit expectations and boundary making. In this respect consent in SM goes beyond a formal consent model towards the substantive realities of mutuality and communication.⁴⁰ Weinberg et al note in their ethnographic study of sadomasochism over six years in San Francisco and New York that amongst their participants, “a person who was not consenting would be considered neither into SM nor sexually desirable”.⁴¹ For Beckmann’s participants, SM was not workable without empathy and communication.⁴² Arguably then we can read SM as being not of equal worth but in fact potentially less worrying and exploitative than “normal” sex.

E. RISKY BUSINESS

The court in *Brown* appeared acutely concerned with the risk of SM to both the participants, and to the public in general. The law here is engaged in the construction of certain kinds of sexual subjects; those who knowingly and consensually risk transmission of HIV (a potentially lethal disease) are depicted as normal responsible sexual subjects who have made responsible choices, but those who deliberately risk injury through sado-masochistic sex are perceived to be irresponsible, deviant, out of control and dangerous. This occurs not only through the explicit words of the majority in *Brown*. The ways in which responsibility in sexual citizenship is constructed by law here is apparent through the normalising effect of consent: in relation to HIV, consent *is* the key operative concept that transforms the potentially unlawful act (whether that

⁴⁰ See Law Commission, *Consent in the Criminal Law* (Law Com CP No 139) part 10. See also D Archard *Sexual Consent* (1998) ch 7.

⁴¹ Weinberg, Williams and Moser (n 20) at 385.

⁴² Beckmann (n 14) at 82.

be deliberate or reckless transmission – or even endangerment) into a mutually agreed upon normal course of behaviour.

Risks of all sorts are inherent in sexual contact. We are at risk of disease, of injury, of fraud and misrepresentation, of assault and rape, and some of us are at risk of becoming pregnant. But we do not outlaw “normal” or non-SM consensual sexual encounters on the basis that they are all, to some extent, risky, and that some will end in a negative outcome. Allowing consenting adults to engage in sex that carries a risk of HIV is testament to this. In other words, we value (historically, reproductive, hetero) sex to the degree that we are willing to accept some level of risk, and some level of abuse and violence, and ultimately are unwilling to outlaw sexual intercourse on the basis of these risks and negative outcomes. Clearly the same is not true of SM. SM sexual contact is not valued as a valid form of sexual expression and therefore the courts have focussed on the risks, the potentially negative outcomes and use these as a basis for outlawing SM.

This focus on risk and the labelling of SM as the most risky form in the spectrum of sexual behaviour is in contradistinction to the perceptions of those who take part in SM sexual activities. Participants in Beckmann’s study⁴³ saw their behaviour as less risky than “regular” sex – as a response to HIV and AIDS, and a way to avoid risks of “normal” penetrative intercourse – both by heterosexual and gay male subjects who have tried to avoid the normative constraints of penetrative sex. Freedom or release through SM is also described by some participants – freedom from constraining expectations of what is normal sex. As Halley says, freedom might be not be a release from repression as such but “a *practice* of active engagement *in power*”.⁴⁴ Beckmann’s participants reported a feeling of safety – not only in terms of safe sex but in terms of community, and an environment of trust,⁴⁵ but also a feeling of spiritual release: injuries do not hurt, rather it is similar to being caressed.⁴⁶ Remember also that in *Brown* itself, the court recognised that (unlike in *Slingsby*) there were no lasting injuries, no infections and no physical damage requiring medical treatment. In other words, these men were skilled in carrying out physically testing, painful and at the same time pleasurable acts that did not “harm” the so called victims.

⁴³ Beckmann (n 14).

⁴⁴ J Halley, “Gender, sexuality and power: is feminist theory enough?” (Parts III and VII) (2003) 12 Columbia Journal of Gender and Law 610 at 615.

⁴⁵ See also Weinberg, Williams and Moser (n 20).

⁴⁶ Beckmann (n 14) at 88.

Similarly, the focus in SM often moves away from penetrative or even genital acts and encompasses a range of other acts that decentre “normal” genital contact and emphasise the sensuality and erogeneity of the whole body. Since there is no what Beckmann calls “direct path” between the act and the pleasure, and because the contact is not genital, it encourages broader and more explicit communication between parties as to pleasure, and displaces the expectation that (penile) penetration is the epitome of sexual pleasure.⁴⁷ This was also referred to by one of the gay men Beckmann interviewed who saw his (non-penetrative) SM practice as an alternative to what he saw as the penetrative sexuality in gay culture.

One cannot therefore read the criminalisation of SM in the following way: it is quintessentially “normal” (and therefore not harmful) to have penile penetrative sex (and perhaps this is even true now for gay men), and perhaps also digital penetration. Therefore, injuries caused in this way do not count as assaults. Other forms of penetration, however, or other non-genital forms of sexual contact (for example using instruments) that cause similar levels of injury, are inherently too “risky” (though one might suspect that it is really “normal society” that is perceived to be at risk) and therefore do not fall within the protected scope of behaviours and therefore are assaults.⁴⁸

F. CONCLUSION: OPTIMISM OVER EXPERIENCE?

Criminalisation of SM is disproportionate, unnecessary and in many ways unenforceable. Where it is enforced, the pain of pleasure is the cost and pain of punishment. This chapter has offered a re-reading of the law on SM in both Scotland and in England and Wales, to demonstrate how law constructs responsible

⁴⁷ Ibid.

⁴⁸ As some writers (for example E Wilkinson, “Perverting visual pleasure: representing sadomasochism” (2009) 12 *Sexualities* 181) have, however, pointed out, certain levels of SM that are perceived to be kinky rather than injurious – spanking, tying up, etc – have been eroticised in popular culture and thus socially as well as legally marked out as inherently different from the kinds of behaviour engaged in by the defendants in *Brown*. Consider for example the Max Mosley’s suit against the News of the World in 2008, where Eady J held that with respect to his acts of (heterosexual) sadomasochism with prostitutes, Mr Mosley was entitled to privacy, no matter how unconventional his sex life. See *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777.

(hetero)sexual citizens as opposed to risky, perverted and dangerous sexual deviants (SMers).

A traditional radical feminist reading might see SM as more structurally problematic, as representing all that is wrong with dominance and subordination in gender relations.⁴⁹ However a more “sex radical” feminism would re-read SM as an opportunity for women to step outside traditional gendered socio-sexual scripts of passivity and victimhood, and away from subordination laden protectionism.⁵⁰ Yet another alternative perspective which leans more towards queer and post modern feminism, which I have tried to present here, focuses on the ways in which the law both produces and regulates certain kinds of sexual subjects, and raises the possibility that we might reimagine law in a less gendered and heteronormative way in order, as Janet Halley would say, to get “a better outcome for the pervert”.⁵¹ Historically, sexual stimulation has not always been negatively perceived and the notion of sado-masochism is historically contingent and socially constructed.⁵² The Scottish criminal courts have yet to meet a case of SM head on. Let us hope, then, that despite the often heteronormatively conservative role of the courts, when faced directly with the question of the lawfulness of SM, the courts here will present us with a better outcome for the pervert.

⁴⁹ S Jeffreys, *The Lesbian Heresy: A Feminist Perspective on the Lesbian Sexual Revolution* (1994).

⁵⁰ For discussion see B Cossman, “Gender, Sexuality and power: is feminist theory enough?” (Parts I and IV) (2003) 12 *Columbia Journal of Gender and Law* 610 at 620.

⁵¹ Halley (n 44) at 636.

⁵² Weinberg, Williams and Moser (n 20).